No. 85-682

Supreme Court, U.S.
FILED
OCT 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

vs.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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25pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a federal district court has jurisdiction to enjoin a State non-property tax that it finds to be in violation of the 4-R Act (49 U.S.C. § 11503).

   A. Whether the jurisdictional bar of the Tax Injunction Act can be overridden in a particular case by another federal statute which does not by its explicit terms authorize federal court injunctive relief in that case.

   B. Whether the 4-R Act, which authorizes federal court injunctive relief only where there is a suitably large disparity in property value assessment, authorizes federal injunctive relief against a non-property State tax.

II. Whether the Court of Appeals erred in holding that Plaintiffs, who are themselves not common carriers by railroad, can invoke the protection of the 4-R Act.

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GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

vs.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Trailer Train Company, Railbox Company and Railgon Company v. Bair,* 765 F.2d 744 (8th Cir. 1985). Appendix B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was entered on June 25, 1985. A timely Petition for Rehearing was denied by that Court on August 2, 1985. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. Accordingly, this Petition is timely under 28 U.S.C. § 2101 (c) and Supreme Court Rule 20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

———o———

STATUTORY PROVISIONS INVOLVED

This case involves the anti-tax discrimination provisions of section 306 (1) (d) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 ("4-R Act") contained in 49 U.S.C. § 11503 (b) (4). This section reads:

> (1) [A]ny action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> • • •
>
> (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

In addition, this case involves section 306 (2) (c) of the 4-R Act, which provides that:

> Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district court of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments which may be necessary to perfect, restrain, or terminate any acts in violation of this section, except that —
>
> • • •
>
> (c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

The remaining federal statute involved in this case is the Tax Injunction Act, 28 U.S.C. § 1341:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law, where a plain, speedy and efficient remedy may be had in the courts of such State.

The State tax invalidated by the district court is the Iowa Railway Mileage Tax, codified as Iowa Code Chapter 435. Because of the length of this statute, it is set out verbatim in Appendix C.

STATEMENT OF THE CASE

Respondents are companies engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad. The cars are furnished to common carriers by railroad for use in interstate commerce and are subject to the jurisdiction of the interstate commerce commission. The companies themselves, however, are not common carriers by railroad.

Respondents are all subject to the Iowa Railway Mileage Tax, defined in Chapter 435 of the Iowa Code. This tax is levied at a rate of one and one-fourth cents per loaded mile and applies to all loaded mileage travelled in or through the State of Iowa by freight line and equipment cars during a given calendar year.

Petitioner is the Director of the Department of Revenue of the State of Iowa. He is in charge of the assessment and collection of this tax.

Respondents challenged this tax in the United States District Court for the Southern District of Iowa, alleging that section 306 of the 4-R Act invalidated the tax. Jurisdiction in the district court was based on 28 U.S.C. § 1337 (civil action arising under an Act of Congress regulating commerce) and 28 U.S.C. § 1331 (federal question jurisdiction).

Petitioner argued in response that section 306 did not apply to non-property taxes, and that, in any event, Respondents could not assert the protection of this statute. The district court rejected these arguments and granted Respondents' Motion for Summary Judgment. Appendix A.

This decision was affirmed on appeal to the United States Court of Appeals for the Eighth Circuit. Appendix B. At oral argument before the Eighth Circuit, Petitioner argued that the Tax Injunction Act, 28 U.S.C. § 1341, divested the district court of jurisdiction to enjoin enforcement of the tax. This jurisdictional argument was not addressed in the Eighth Circuit decision affirming the district court. The jurisdictional argument was raised again in a timely Petition for Rehearing, but that Petition was denied.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A. This Court should review this case to determine the circumstances under which an act of Congress can override the Tax Injunction Act.

The Tax Injunction Act, 28 U.S.C. § 1341, has as its "principal purpose" to "limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *California v. Grace Brethren Church*, 457 U.S. 393, 408-09 (1983); *Rosewell v. LaSalle National Bank*, 450 U.S. 503, 522 (1981). This statute codifies principles of comity which themselves stand as a jurisdictional bar to the granting of injunctive relief against a State tax. *Fair Assessment In Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981).

Alhough it is certainly within the perogative of Congress to pass legislation allowing, in a specific case, a district court to enjoin the operation of a State statute, this

should, in light of the compelling State concerns mentioned previously, be found only when a clear intent to do so is expressed in the legislation. *Cf. Grace Brethren Church,* 457 U.S. at 413 (exceptions to the Tax Injunction Act should be narrowly construed). This position is consistent with this Court's requirement that Congress enact a "clear statement" of its intent when a congressional enactment impinges on traditional State authority. *See United States v. Bass,* 404 U.S. 336, 349 (1971); *Rewis v. United States,* 401 U.S. 808, 812 (1971); *United States v. Five Gambling Devices,* 346 U.S. 441, 449 (1953).

Section 306(2) authorizes injunctive relief "[n]otwithstanding any provision of section 1341" but then, significantly, goes on to provide that "no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction". It is only by completely ignoring this provision that section 306 can be held to override the Tax Injunction Act. Such expansive construction of this statute, or any statute which purports to override the Tax Injunctive Act, threatens the vitality of that Act and threatens, as well, the very foundation of federalism which motivates, and is codified in, section 1341. Therefore, it is only where an act of Congress clearly and explicitly, by its own terms, authorizes an injunction against a State tax that a federal court obtains jurisdiction to order such relief.

B. If unreviewed, the expansive construction of § 306(2) by the Eighth Circuit, will severely impair the ability of the States to administer their own tax systems without unnecessary federal interference.

As the Eighth Circuit noted, the Courts have held that the 4-R Act does apply to non-property taxes. This is so notwithstanding the overwhelming property tax context of that statute. However, the mere applicability of this statute to non-property taxes does not, in and of itself, authorize federal judicial injunctions against such taxes. The relief provision of § 306 explicitly contemplates that, even for property taxes, there will be circumstances under which a federal district court has no jurisdiction to order injunctive relief. This does not mean that complaining taxpayers are deprived of a remedy; it simply means they are deprived of a remedy in federal court. The availability of a state court remedy fully protects whatever rights taxpayers may have under § 306. *Grace Brethren Church*, 457 U.S. at 417 n. 27.

Exceptions to the Tax Injunction Act must be narrowly construed. *Grace Brethren Church*, 457 U.S. at 413. In particular, the provision of section 306 authorizing federal injunctive relief must be narrowly construed. This conclusion has already been reached by federal courts in this jurisdiction; see *Burlington Northern Railroad Company v. Bair*, 584 F.Supp. 1229, 1232 (S.D. Iowa 1984), *affirmed in part and remanded in part on other grounds*, 766 F.2d 1222 (8th Cir. 1985). Invocation of section 306 (2) to authorize judicial relief in cases of non-property taxes, is the direct antithesis of narrow construction of that statute. In fact, this construction extends section 306 (2) to

cover situations to which the statute itself, by its own explicit language, does not apply.

An interpretation of the reach of the 4-R Act by this Court is necessary because an expansive reading of this statute by lower courts threatens the revenue systems of many states. If the statute is held to authorize federal injunctive relief in cases of non-property taxes, the tax structure of many states will be impaired. Reasonable state excise taxes traditionally imposed on rail carriers, such as income, sales and use, business license and gross receipts taxes, are potentially endangered. These taxes provide vital sources of revenue which allow states to assume their responsibility of providing citizens with needed services.

C. This Court should review this case to resolve a conflict among the federal courts as to whether companies which are not themselves common carriers by railroad can invoke the protection of the 4-R Act.

In *Trailer Train Co. v. State Board of Equalization*, 538 F.Supp. 509, 513 (N.D. Cal. 1982) the federal district court for the Northern District of California held that the statutory prohibition of discriminatory treatment of a common carrier by railroad did not apply to companies which, like the Plaintiffs in this case, were not common carriers by railroad. This conclusion, however, was rejected by the Eighth Circuit Court of Appeals in *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983), and rejected again in the case from which review is now sought.

This issue is, thus, one on which the lower federal courts are split. In addition, this issue is one of consider-

able importance to the ability of the states to effectively administer their tax systems.

It has already been observed that an expansive reading of the 4-R Act threatens the sovereign power of the states to run their own tax systems. The holdings of the Eighth Circuit extend the scope of the 4-R Act beyond all existing precedent and yield anamalous results. If a business entity can claim the protection of the 4-R Act merely because an increased cost of consumption deriving from a state tax "results" in discriminatory treatment against a common carrier by railroad, then, for example, a manufacturer of railroad seat covers could legitimately invoke the 4-R Act, as could a person who sells uniforms for train conductors.

The clear language of the statute also supports Petitioner's position. The statute does not refer to non-rail carriers at all, except for reference to "transportation property", a term which is explicitly defined by the statute itself and used in subsections (a) through (c) of section 306, but not subsection (d) of that section. Thus, where Congress wanted to extend the applicability of section 306 beyond railroads themselves, it made clear its' intent to do so. In subsection (d), Congress explicitly shifted the emphasis of the statute from owners of rail property to "common carriers by railroad". It is only by reading beyond the clear language of the statute that subsection (d) can be interpreted so as to apply to Respondents. It is ironic that Respondents, who have consistently argued that the statute is clear and should be literally applied, now seek a judicial interpretation of the statute that goes beyond its literal language.

In conclusion, this Court should review the decision of the Eighth Circuit to revolve a conflict between lower federal courts, and to limit the scope of the 4-R Act to that which was intended by Congress.

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CONCLUSION

For these reasons a Writ of Certiorari should issue to review the opinion of the United States Court of Appeals for the Eighth Circuit.

Respectively submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 83-528-A

TRAILER TRAIN COMPANY, RAILBOX COMPANY and RAILGON COMPANY,

Plaintiffs,

vs.

GERALD D. BAIR, Director of the Department of Revenue of Iowa,

Defendant.

———o———

ORDER FOR JUDGMENT

(Filed November 21, 1984)

This is an action for declaratory and injunctive relief against the collection of Iowa Railway Mileage Taxes from Plaintiffs, Trailer Train Company ("Trailer Train"), Railbox Company ("Railbox") and Railgon Company ("Railgon"), referred to collectively herein as the "Companies." The Companies contend that the Iowa Railway Mileage Tax is unlawful under Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, now codified at 49 U.S.C. § 11503 and referred to herein as "Section 306".

This case is before the Court on cross-motions for summary judgment. The Companies seek a judgment de-

claring the Railway Mileage Tax unlawful under Section 06(1)(d) and enjoining its collection. Defendant, hereinafter referred to as the "Director," seeks a judgment dismissing the Companies' complaint solely on the legal ground that this Court is without jurisdiction under Section 306 to invalidate discriminatory state taxes other than property taxes and that the Companies, because they are not common carriers by railroad, are not entitled to the protections of Section 306(1)(d).

Based upon the parties' stipulation, the parties' papers filed pursuant to rule 2.2.7 of the rules of this Court, and upon the statements of counsel, this Court concludes that there is no dispute among the parties with respect to the following material facts:

FACTS

a. The Companies

13. The Companies are engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad.

2. The Companies' cars are furnished to common carriers by railroad for use in interstate commerce and are subject to the jurisdiction of the Interstate Commerce Commission ("ICC"). The Companies themselves are not common carriers by railroad.

3. The Companies' cars have been defined by the ICC as "transportation property" within the meaning of Section 306(3)(d). *See* ICC Docket No. 36873 (Jan. 10, 1979).

4. Trailer Train and Railbox both operate under a car pooling arrangement approved by the ICC in the

Report and Order of the Interstate Commerce Commission in American Railbox Company and Trailer Train Company — Petition for Approval of the Pooling of Car Service With Respect to Boxcars, Finance Docket No. 27589 (August 1, 1974) and in *Trailer Train Company, et al — Petition for Approval of the Pooling of Car Service With Respect to Flatcars, Finance Docket No. 27590 (August 4, 1974)*, 347 I.C.C. 862 (1974) (hereinafter cited as "ICC Report"). Railgon operates under a car pooling arrangement similar to the ICC Report.

5. As noted in the ICC Report, Trailer Train was formed by thirty-two operating railroads, each of which was a shareholder in Trailer Train and each of which was a guarantor of certain of Trailer Train's debt obligations. Railbox and Railgon are wholly-owned subsidiaries of Trailer Train.

6. The Companies acquire railroad cars by lease or purchase and furnish such cars to railroads operating in Iowa (and elsewhere) pursuant to car-service contracts.

7. Under such car-service contracts (the basic terms of which were approved by the ICC in the ICC Report), the Companies agree to provide sufficient numbers of cars to meet the railroads' demands in exchange for the railroads' payment to the Companies of a per diem charge (and, for some cars, an additional per mile charge) for the use of each car furnished. The Companies retain responsibility for the routine maintenance of all cars in their pool. All state taxes are paid by the Companies as an expense of operation.

8. The Companies are the agents through which common carriers by railroad fulfill their obligations under the

Interstate Commerce Act to provide adequate car service. In effect, the Companies are the instrumentalities by which common carriers meet car service requirements and furnish transportation service to the public. As stated in the ICC Report:

> It is our [the ICC's] conclusion that, at the present time, a carrier-owned car company which owns (or leases) and maintains a fleet of cars to be leased to participating railroads constitutes an agent through which the participating railroads may perform a portion of their transportation operations while retaining their individual obligations under the act [i.e., § 1(11) of the Interstate Commerce Act, 49 U.S.C. § 11121], and that the creation of such an exclusive agent, which has neither the powers nor responsibilities of a common carrier as these remain with the individual participating railroads, constitutes a means by which services, equipment and revenue may be pooled under section 5(1) of the act. The pooling arrangements herein closely conform with this requisite pattern in that the participating railroads do not intend to avoid their obligations under the act to provide adequate car service but will merely employ either Trailer Train or Railbox or both as instrumentalities through which such responsibilities may be performed; *the pool cars, though owned, maintained, and partially directed by Trailer Train and Railbox, are entirely under the control of the individual railroads while on their lines, the actual transportation function is performed by the participating railroads themselves; and the Trailer Train and Railbox merely constitute agents whereby the railroads may jointly perform specific transportation functions.* [Emphasis added].

ICC Report, pp. 879-80.

9. By contracting with the Companies for car service, common carriers by railroad obtain access to a larger

fleet of cars without expending substantial amounts of cash or incurring long-term debt. Railroads that are owners of Trailer Train also (1) share the cost of ownership, operation and maintenance of their cars; (2) transfer to the Companies the burden of managing, controlling and accounting for vast numbers of cars; (3) obtain sufficient numbers of standardized cars for their railroad operations; (4) obtain favorable financing for rail cars through Trailer Train and (5) share in car research and development information.

10. The Companies have no property permanently located in Iowa, and their sole relationship to the State of Iowa arises by reason of the location of, or operation of, railroad cars through or in the State of Iowa by railroads pursuant to the agreements described above. The Companies have no offices, facilities, employees or other such nexus with the State of Iowa.

b. Section 306

11. Enacted in 1976, Section 306 expressly declares that discriminatory state taxation of railroads constitutes an unreasonable and unjust discrimination against, and an undue burden upon, interstate commerce. Sections 306(1)(a), (b) and (c) provide that a state, a subdivision of a state, or any authority acting for a state or a subdivision of a state, may not assess, levy or collect discriminatory ad valorem taxes upon rail transportation property. Section 306(1)(d), which is the focus of this litigation, provides that a state, subdivision of a state, or any authority acting for a state or a subdivision of a state,

may not impose "any other tax which results in discriminatory treatment of a common carrier by railroad."[1]

c. Railway Mileage Tax

12. For many years prior to 1978, the State of Iowa imposed an ad valorem tax upon the cars of "freight-line" and "equipment companies" operating within the State of Iowa. "Freight-line" and "equipment companies" were defined to be companies engaged in the business of furnishing or leasing cars to be used in the operation of any rail line within the state (except for companies that owned, leased or operated the rail line on which such cars were operated, or companies that otherwise listed their property for taxation). Prior to 1978, Trailer Train and Railbox paid this ad valorem tax. (Railgon did not exist prior to 1978). For the last year in which an ad valorem tax was imposed upon freight-line and equipment companies, Trailer Train's ad valorem tax liability to the State of Iowa was $30,719.00.

13. In 1978, the ad valorem tax imposed on Companies was repealed by Acts 1978 (67 G.A.) Chapt. 1149, § 13, effective July 7, 1978.

14. The ad valorem tax on freight-line and equipment companies was replaced by a "Railway Mileage Tax," imposed under Chapter 435, Code of Iowa, §§ 435.1 through 435.8.

15. The Railway Mileage Tax is imposed on the loaded mileage of "freight-line and equipment car companies,"

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[1] The quoted language is from Section 306 as enacted, Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976); *See Atchison, Topeka & Santa Fe Ry. v. Bair*, 535 F. Supp. 68, 71 (S.D. Iowa, 1982).

which are defined by §435.1, Code of Iowa, as companies that operate, furnish or lease railroad cars to be used in the operation of any railway line located within the State of Iowa. The Railway Mileage Tax is levied at a rate of one and one-fourth cents per loaded mile and applies to all loaded mileage traveled in or through Iowa by freight line and equipment cars during a given calendar year. Chapter 435, Code of Iowa.

16. The Director claims Railway Mileage Taxes against the Companies for the years 1978 through 1982, as follows:

Base Year	Trailer Train	Railbox	Railgon
1978	$1,013,005.15	$46,836.49	———
1979	921,728.09	61,039.26	———
1980	813,316.44	52,897.91	$ 811.38
1981	794,087.26	29,405.40	4,011.23
1982	860,546.73	19,364.38	1,391.40

17. Counsel for the Director admitted in open court that the Railway Mileage Tax results in discriminatory treatment of these Companies as compared with all other commercial and industrial taxpayers in the State of Iowa.

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CONCLUSIONS OF LAW

This case turns upon two questions of law raised by the Director: (1) whether this Court has jurisdiction under Section 306 to prohibit the state from imposing discriminatory non-property taxes upon owners of rail transportation property, and (2) whether the Companies are

entitled to the protections of Section 306(1)(d) even though they are not "common carriers by railroad".

1. By its terms, Section 306 prohibits *all* forms of state taxation that result in discriminatory treatment of common carriers by railroad. Sections 306(1)(a), (b) and (c) forbid discriminatory state taxation of rail transportation property; Section 306(1)(d) forbids the imposition by a state of "*any other tax* which results in discriminatory treatment of a common carrier by railroad."

Notwithstanding the recent decision in *Richmond, Frederick & Potomac R.R. v. Dept. of Taxation*, 591 F. Supp. 209 (E.D. Va. 1984), this Court will not depart from its prior ruling in *Atchison, Topeka & Santa Fe v. Bair*, 535 F. Supp. 68, 71 (S.D. Iowa 1982), that Section 306(1)(d) means precisely what it says, i.e. that Section 306(1)(d) encompasses and prohibits discriminatory nonproperty taxes as well as discriminatory property taxes. This Court believes that *Alabama Great Southern Ry. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981) and its progeny [e.g. *Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983) *cert. denied*, 104 S.Ct. 1427 (1984), and *Kansas City Southern v. McNamara*, 563 F. Supp. 199 (M.D. La. 1983)] were correctly decided. Furthermore, this Court believes that the *Eagerton* line of decisions is consistent with Congress' prupose in enacting Section 306 which, as described in *Ogilvie v. State Board of Equalization*, 492 F.2d 446, 454-55 (D.N.D. 1980) *aff'd*, 657 F.2d 204, 210 (8th Cir. 1981), was to prohibit tax discrimination in any form whatsoever. Therefore, this Court holds that it has jurisdiction under Section 306 to entertain an attack upon nonproperty taxes which result in discriminatory treatment of common carriers by railroad.

2. Although the Companies are not "common carriers by railroad" as that phrase is used in Section 306(1)(d), they nevertheless are entitled to the protections of Section 306(1)(d). Because of the Companies' close relationship with common carriers by railroad—the Companies are owned by major railroads and are the agents through which the railroads fulfill many of their car service obligations—a state tax that discriminates against the Companies "*results* in discriminatory treatment of a common carrier by railroad" within the meaning of Section 306(1)(d). *Trailer Train Company v. State Board of Equalization*, 710 F.2d 468 (8th Cir., 1983). This Court holds, therefore, that the Companies are protected under Section 306(1)(d) to the same extent as common carriers by rail and that they may attack *any* discriminatory state tax that is imposed upon them.

3. Since this Court has jurisdiction of the Companies' claim under Section 306 and the Director has conceded on the record the discriminatory nature of the Railway Mileage Tax as it is applied to these Companies, this Court concludes that the Railway Mileage Tax is unlawful under Section 306(1)(d) and that the Director, and all those in active concert or participation which him, should be permanently enjoined from assessing, levying or collecting Railway Mileage Taxes from the Companies for the 1978 base year forward. *See, Alabama Great Southern Ry. v. Eagerton*, 541 F. Supp. 1084, 1087 (M.D. Ala. 1982).

ORDER

Plaintiffs' motion for summary judgment is granted. Defendant's countermotion for summary judgment is denied.

Defendant, Gerald D. Bair, Director of the Department of Revenue of Iowa, his successors in office, and all those in active concert or participation with them, are hereby permanently enjoined and restrained from levying, assessing or collecting Railway Mileage taxes from the plaintiffs herein for the 1978 base year and for each base year thereafter.

Each party will bear its own costs.

ENTERED this 21st day of November, 1984.

/s/ WILLIAM C. STUART, JR,
Chief Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-2583

Trailer Train Company, Railbox Company and Railgon Company,

Appellees,

v.

Gerald D. Bair, Director of the Department of Revenue of Iowa,

Appellant.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: May 16, 1985

Filed: June 25, 1985

Before LAY, Chief Judge, BOWMAN, Circuit Judge, and DEVITT,* District Judge.

LAY, Chief Judge.

The Director of the Department of Revenue for the State of Iowa appeals from a ruling of the district court, Honorable William C. Stuart. The case arises under section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (codified at 49 U.S.C. § 11503).

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* The HONORABLE EDWARD J. DEVITT, Senior United States District Judge for the District of Minnesota, sitting by designation.

Plaintiffs are companies engaged in the business of furnishing fleets of standardized railroad cars to common carriers by railroad. These railroad cars are considered "transportation property" by the ICC. *See* ICC Docket No. 36873 (Dec. 13, 1978). Under Iowa Code § 435, a "railway mileage tax" is imposed on plaintiffs on the basis of the number of miles their loaded cars travel in or through the state. The Director admits the tax is discriminatory. However, the Director contends plaintiffs are not entitled to protection under section 306 because: (1) they are not common carriers by railroad; and (2) section 306 does not apply to non-property taxes.[1]

The Director's first contention has already been considered and rejected by this court in a previous case. *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468, 471-73 (8th Cir. 1983). Even if we were inclined to disagree with *Trailer Train*—which we are not—only the court en banc can overrule prior circuit precedent. The district court did not err in finding section 306 protects plaintiffs even though they are not common carriers by railroad.

The Director's second argument runs contrary to all precedent. We have stated that section 306 was intended to prevent tax discrimination "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Director admits Iowa's railway mileage tax results in discrim-

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[1]We note the Director has made the opposite argument to this court in *Burlington Northern v. Bair*, No. 85-1410 (8th Cir. 1985), contending § 306(1)(d) applies only to taxes other than property taxes.

ination. Contrary to the Director's argument, we have already indicated that section 306(1)(d)[2] is "applicable to all forms of state taxation rather than just property taxation." *Trailer Train,* 710 F.2d at 472 n.6. Other courts have reached the same conclusion. *Alabama Great Southern Railroad v. Eagerton,* 663 F.2d 1036 (11th Cir. 1981); *Kansas City Southern Railway v. McNamara,* 563 F. Supp. 199, 200 (M.D. La. 1983); *Atchison, Topeka & Santa Fe Railroad v. Bair,* 535 F. Supp. 68, 70-71 (S.D. Iowa 1982); *Atchison, Topeka & Santa Fe v. Bair,* 338 N.W.2d 338, 344-46 (Iowa 1983), *cert. denied,* — U.S. —, 104 S.Ct. 1427 (1984).

The Director relies on *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation,* 591 F. Supp. 209 (E.D. Va. 1984), which used legislative history to create ambiguity in section 306(1)(d) and conclude that Congress intended to limit its effect to property taxes. However, the Fourth Circuit has recently overruled *Richmond* to the extent it held that section 306(1)(d) does not apply to non-property taxes. *Richmond, Fredericksburg & Potomac Railroad v. Department of Taxation,* No. 84-1774 (4th Cir. 1985). The Fourth Circuit affirmed the judgment in favor of the Commonwealth of Virginia only on the ground that there was no discrimination.

---

[2] § 306(1) * * * It is unlawful for a State, a poliaical subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

* * *

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

Finding no merit to the arguments of the Director, we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

§ 435.1, RAILWAY MILEAGE TAX

CHAPTER 435

RAILWAY MILEAGE TAX

Referred to in § 427.1(35), 441.47

435.1	Definitions.	435.6	Determination of tax due—limitation.
435.2	Tax imposed.	435.7	Refunds.
435.3	Returns.	435.8	Statutes applicable to tax.
435.4	Payment of tax.	435.9	Credit of tax to special fund.
435.5	Penalty.		

435.1 Definitions.

As used in this chapter unless the context otherwise requires:

1. *"Car company"* means freight line and equipment car companies.

2. *"Company"* means a sole proprietorship, partnership, limited partnership, corporation or other business entity.

3. *"Freight line company"* means a company engaged in the business of operating cars not otherwise listed for taxation or taxed in this state for the transportation of freight over any railway line located within this state, if such line is not owned, leased or operated by such company.

4. *"Equipment car company"* means every company engaged in the business of furnishing or leasing cars to be used in the operation of any railway line located within

this state, if such line is not owned, leased or operated by such company and the cars are not otherwise listed for taxation in this state.

5. *"Car"* means all railroad cars whether termed box, flat, coal, ore, tank, gondola, refrigerator or another name.

6. *"Director"* means the director of revenue.

7. *"Department"* means the department of revenue.

8. *"Railway"* means companies subject to taxation under chapter 434.

9. *"Miles"* or *"mileage"* means loaded miles of each railroad car whether in intrastate or in interstate commerce traveled in or through the state.

10. *"Base year"* means the calendar year immediately preceding the year in which the tax return is required to be filed under this chapter.

[C79, 81, § 435.1]

435.2 Tax imposed.

A tax is hereby imposed on the mileage of freight line and equipment car companies at a rate of one and one-fourth cent per mile and shall apply to all mileage traveled in or through this state during the base year. The cars of the car companies subject to this tax shall not be subject to a property tax, nor shall the rental of such cars be subject to any sales or use tax.

[C79, 81, § 435.2]

Referred to in § 435.8, 435.9

435.3 Returns.

Each car company subject to taxation under this chapter shall annually file a return on or before the first Monday in June. The return shall include a true and accurate statement of the miles traveled in or through this state during the base year on railway lines not owned or operated by the car company. The return shall also include the following:

1. The name of the car company.

2. The nature of the company and its business.

3. The address of the individual to be contacted concerning the return.

4. The railroad company for which the Iowa miles were traveled.

5. An attestation as to the accuracy of the return.

[C79, 81, § 435.3]

Referred to in § 435.4

435.4 Payment of tax.

The tax due shall be paid in full and shall accompany the return required to be filed by section 435.3. If payment does not accompany the return or payment is not in the amount shown due and payable on the return, the company is subject to interest at the rate in effect under section 421.7 for each month or fraction thereof on the balance due.

[C79, 81, § 435.4; 81 Acts, ch 131, § 12]

435.5 Penalty.

If any person fails to remit at least ninety percent of the tax due with the filing of the return on or before the due date, or pays less than ninety percent of the total

amount of the tax due as shown on the return, there shall be added to the tax a penalty of five percent of the tax due. In case of willful failure to file a return with intent to evade tax, or in case of willfully filing a false return with intent to evade tax, in lieu of the penalty above provided, there shall be added to the amount required to be shown as tax on the return fifty percent of the amount of the tax. The penalty imposed under this section is not subject to waiver.

[C79, 81, § 435.5; 82 Acts, ch 1180, § 6,8]
84 Acts, ch 1173, § 8, 10

Referred to in § 435.6

1984 amendment effective January 1, 1985 for taxes due and payable on or after that date. 84 Acts. ch 1173, § 10

435.6 Determination of tax due—limitation.

The department has three years from the time the return was filed or after the return became due, including any extensions of time for filing, whichever time is the later, to audit the return and determine its accuracy. If it is shown by the audit that additional tax is due, interest at the rate in effect under section 421.7 for each month or fraction thereof shall be added to the additional tax shown to be due.

The period for determination of tax due shall be unlimited in the case of a false or fraudulent return with intent to evade tax or in the case of failure to file a return.

If the tax due is greater than the amount paid, the department shall compute the amount due, together with interest and penalties as provided in section 435.5, and shall notify the taxpayer by certified mail of the total if

paid on or before the last day of the month in which the notice is postmarked.

If it is shown that an overpayment was made, interest at the rate in effect under section 421.7 for each month or fraction thereof shall be added to the overpayment with interest commencing sixty days after the date of payment.

The railway companies, submitting mileage pertaining to the car companies subject to the tax imposed by this chapter, shall make available, at the department's request, their books or records to ascertain the correct mileage.

Car companies submitting returns under this chapter shall also make available at the department's request, their books or records to ascertain the correct mileage.

[C79, 81, § 435.6; 81 Acts, ch 131, § 13, 14]

Referred to in § 435.7

435.7 Refunds.

If any tax, penalty or interest has been paid which was not due under the provisions of this chapter, then such amount plus any interest imposed as a result of section 435.6 shall be credited against any tax due or to become due under this chapter from the car company which made the erroneous payment or shall be refunded to such car company by the department. A claim for refund or credit that has not been filed with the department within three years after the tax payment upon which a refund or credit is claimed became due or one year after such tax payment was made, whichever time is the later, shall not be allowed by the director.

[C79, 81, § 435.7]

435.8 Statutes applicable to tax.

All the provisions of sections 422.26 and 422.28 to 422.30, consistent with the provisions of this chapter, shall be applicable to car companies subject to the tax imposed under section 435.2

[C79, 81, § 435.8]

435.9 Credit of tax to special fund.

For the fiscal years beginning on or after July 1, 1983, the net proceeds of the tax imposed by section 435.2 and penalties collected under this chapter shall be credited to the special railroad facility fund established in section 307B.23 and any refunds made pursuant to this chapter shall be made from this fund. However, for each fiscal year of the fiscal biennium beginning July 1, 1981 and ending June 30, 1983, the total of the net proceeds of the tax imposed by section 435.2 and penalties collected under this chapter in excess of one million fifty thousand dollars collected in the fiscal year beginning July 1, 1981 and in excess of one million one hundred forty thousand dollars collected in the fiscal year beginning July 1, 1982 shall be credited to the special railroad facility fund.

[81 Acts 2d Ex, ch 3, § 20]

Referred to in § 307B.23

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-682 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

VS.

TRAILER TRAIN COMPANY, RAILBOX COMPANY, AND RAILGON COMPANY

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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25 pp

QUESTION PRESENTED

Dissatisfied with the Petitioner's presentation of the question presented, Respondents state the question as follows:

I. Whether a federal district court has jurisdiction to enjoin a State non-property tax which is admittedly discriminatory and which "results in discriminatory treatment of a common carrier by rail" within the meaning of Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976?

II. Whether the courts below erred in holding that Petitioners, who are themselves not common carriers by railroad, can invoke the protections of Section 306(1)(d)?

LIST OF PARTIES TO THIS PROCEEDING

The Petitioner is the Director of the Department of Revenue of the State of Iowa (referred to hereinafter as the "Director").

Respondents are Trailer Train Company, Railbox Company and Railgon Company (referred to hereinafter as the "Carlines"). Railbox and Railgon are wholly-owned subsidiaries of Trailer Train Company, a Delaware corporation whose shareholders are listed in Appendix A to this brief.

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IN THE

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OCTOBER TERM, 1985

No. 85-682

GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA,

Petitioner,

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Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (reprinted in Appendix B to the Petition) is reported at 765 F.2d 744. The opinion of the United States District Court for the Southern District of Iowa, dated November 21, 1984 (reprinted in Appendix A to the Petition) is unreported.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISIONS INVOLVED

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 54 (1976) ("Section 306"), now codified at 49 U.S.C. § 11503.

The language of 49 U.S.C. § 11503 as codified differs from the language of Section 306. The codification cannot, however, be construed as making any substantive change to the meaning of Section 306. *See* Pub. L. No. 95-473, § 3(2), 92 Stat. 1466 (1978). In previous decisions under 49 U.S.C. § 11503, courts of appeal have referred to the language of Section 306 rather than to the language of the codification in resolving issues of statutory construction. *See, e.g., Ogilvie v. State Board of Equalization of the State of North Dakota*, 657 F.2d 204, 206, n. 1 (8th Cir. 1981); *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 640 F.2d 255, 257-58 (10th Cir. 1983). Accordingly, the Carlines will refer to the language of Section 306 in this Response. Section 306 is reprinted in Appendix B to this brief; the provisions of 49 U.S.C. § 11503 are reprinted in Appendix C to this brief.

COUNTERSTATEMENT OF THE CASE

Dissatisfied with the Director's Statement of the Case, the Carlines adopt as their counterstatement the district court's description of the case as set forth in Appendix A to the Petition, pp. App. 1 through App. 7. The Carlines also wish to emphasize certain facts which were entirely omitted from the Director's Statement:

a. Supplementary Statement of Facts With Regard To The Nature of The Iowa Railway Mileage Tax

By the Director's own admission, the Iowa Railway Mileage Tax is discriminatory. (Appendix to Petition, App.

7, ¶ 17.) It is imposed solely upon those persons or entities who furnish rail cars for use in railroad operations in Iowa. No other commercial or industrial taxpayer within the State is subject to the Iowa Railway Mileage Tax, or to any similar tax. Enacted in 1978 (shortly before the effective date of Section 306), the Iowa Railway Mileage Tax replaced the ad valorem tax that had been imposed historically upon the value of the Carlines' cars and exacted a charge of one and one quarter cents for each "loaded mile" traveled by freightline and equipment car companies throughout the state. In the first year that the Iowa Railway Mileage Tax was imposed, Trailer Train Company's tax liability to the State of Iowa exceeded $1,000,000; Trailer Train Company's total tax liability for the previous year under the property tax was only about $31,000. Appendix A to the Petition, App. 6 through App. 7.

b. Supplementary Statement of Facts With Regard To The Course Of Proceedings

The precise jurisdictional question raised by the Director before this Court, i.e., whether the Tax Injunction Act[1] precludes the exercise of federal injunctive power in this case, was not raised before the district court nor briefed before the Court of Appeals. The Director first raised this issue during oral argument before the Court of Appeals. Following the issuance of the Eighth Circuit's opinion (which does not address the jurisdictional question), the Director petitioned for rehearing and attempted once more to argue that § 1341 barred the exercise of federal jurisdiction. The Court of Appeals denied the Director's petition without comment.

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 17 of the Rules of this Court.

[1]28 U.S.C. § 1341.

The Carlines respectfully submit that the Petition should be denied.

1. **No Conflict Exists Among The Circuit Courts, Or Between The Decisions Below And The Decisions Of This Court, With Respect To The "Jurisdictional Issue" Presented For Review.**

The Director urges that it was error for the district court to issue a permanent injunction prohibiting the collection of Iowa Railway Mileage Taxes from the Carlines in this case. The Director contends that, even if the Carlines have a federal *right* to attack discriminatory nonproperty taxes under Section 306(1)(d), they do not have federal injunctive or declaratory *remedies* available to them because of the Tax Injunction Act, 28 U.S.C. § 1341, and the five percent limitation of Section 306(2)(c). Petition, pp. 5, 6. The Director does not identify any conflict among the circuits on this issue; he simply argues the question on its merits.[2]

Section 306(2) expressly confers jurisdiction upon United States district courts to prevent violations of Section 306

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[2]As noted in the Carlines' Counterstatement of the Case, the Director raised this issue for the first time during oral argument before the Court of Appeals. This Court has long held that questions presented in a petition for certiorari must properly arise in the record and have been urged and briefed below. *Tyrrel v. District of Columbia*, 243 U. S. 1 (1917). Only in exceptional circumstances, none of which is present here, will this Court consider issues not pressed or passed upon below. *Adickes v. S. H. Kress and Co.*, 398 U. S. 144, 147 n. 2 (1970). Although this Court will occasionally consider "jurisdictional issues" whether raised below or not, *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956), this Court should refrain from deciding such questions without the benefit of a lower court's opinion. It should be noted, further, that the Director has raised the precise jurisdictional issue presented here in a Section 306 case which is now pending before the same district court that decided this case and which involves the same tax. *ACF Industries, Incorporated, et al. v. Gerald D. Bair*, No. 85-385-A (S.D. Iowa).

notwithstanding 28 U.S.C. § 1341, and without regard to amount in controversy. [Emphasis added.] Section 306(2)(c) states that no relief may be granted under Section 306(2) unless:

> [T]he ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction.

Contrary to the Director's assertions, the five percent limitation of Section 306(2)(c) does *not* reinstate the jurisdictional bar of § 1341. By its terms, the five percent limitation applies only to cases of assessment ratio discrimination and is inapplicable in Section 306(1)(d) cases involving non-property taxes. The five percent limitation was intended by Congress merely to establish a jurisdictional threshold that would preclude taxpayers from obtaining relief in cases of *de minimus* assessment ratio discrimination. *See Louisville & Nashville R. R. v. Louisiana Tax Commission*, 498 F. Supp. 418, 423 (M.D. La. 1980).

Every court that has considered the Director's "jurisdictional" argument has rejected it. *Trailer Train Company v. State Board of Equalization*, 697 F.2d 860, 865-66 (9th Cir. 1983) and *Burlington Northern R. R. v. Bair*, 584 F. Supp. 1229, 1235 (S.D. Iowa 1984), hold expressly that Section 306(2)(c) does *not* limit federal jurisdiction, or the exercise of federal injunctive relief, where the discrimination of which the taxpayer complains takes a form other than assessment ratio discrimination. As stated in *Trailer Train, supra:*

> Given the basic concerns motivating Congress' enactment of §11503, Congress could not have intended that the statute be construed as authorizing the district

> court to enjoin a tax-rate discrimination only when it is accompanied by an assessment-ratio discrimination. Such a literal reading of §11503 ignores Congress' recognition that discriminatory taxation of carriers can result from *either* assessment-ratio or tax-rate discrimination. It also undermines Congress' intent to provide discrimination victims with an injunctive federal-court remedy by placing arbitrary limits on those who could apply for such relief.

697 F.2d at 866. No federal court has construed Section 306(2)(c), or § 1341, as a limitation upon federal jurisdiction or upon the power of the federal courts to fashion appropriate injunctive or declaratory remedies in Section 306(1)(d) cases.

The Director's "jurisdictional" argument is merely a variation of a statutory construction argument that the Director has urged repeatedly and unsuccessfully, i.e., that Section 306 prohibits *only* discriminatory state property taxation and has no applicability to other forms of discriminatory state taxation. This interpretation of Section 306 is belied by the language of the Act itself and has been rejected by every court to address the issue.

Sections 306(1)(a), (b), and (c) prohibit states from assessing, levying or collecting ad valorem taxes based upon discriminatory assessment ratios or tax rates. Section 306(1)(d), which is the focus of this litigation, forbids:

> The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to the jurisdiction of the [Interstate Commerce Act].

Every circuit court that has interpreted this statutory language has held that it means precisely what it says, i.e.,

that *all* forms of state taxation which result in discriminatory treatment of a common carrier by rail are encompassed and prohibited. *Alabama Great Southern R. R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *Richmond, Fredericksburg & Potomac R. R. v. Commonwealth of Virginia*, 762 F.2d 375 (4th Cir. 1985). *See also Atchison, Topeka & Santa Fe Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983) (railroad diesel fuel taxes subject to scrutiny under Section 306); *Kansas City Southern Ry. v. McNamara*, 563 F. Supp. 199 (M.D. La. 1983) (gross receipts taxes); *Atchison, Topeka & Santa Fe Ry. v. Bair*, 535 F. Supp. 68 (S.D. Iowa 1982) (railroad diesel fuel taxes); and *Cheseapeake & Ohio Ry. v. Rose*, No. 82-2564, Memorandum Order (S.D. W.Va., August 22, 1983) (net and gross income taxes).

Both of the courts below concluded that, because of the close functional relationship between the Carlines and common carriers by rail, imposition of the Iowa Railway Mileage Tax upon the Carlines "results in discriminatory treatment of a common carrier by rail" within the meaning of Section 306(1)(d). This interpretation is wholly consistent with federal decisions that have held that Section 306 is intended to prohibit discriminatory state taxation of the railroad industry "in all of its guises," *Southern Railway v. State Board of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), and "in any form whatsoever." *Ogilvie v. State Board of Equalization*, 657 F.2d 204, 210 (8th Cir. 1981). *See also Burlington Northern R. R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *Louisville and Nashville R. R. v. Department of Revenue of the State of Florida*, 736 F.2d 1495 (11th Cir. 1985).

Thus, not only is there no conflict with respect to the "jurisdictional" issue presented for review, the Director's arguments on this issue are meritless.

2. No Conflict Exists Among The Circuit Courts, Or Between The Decisions Below And The Decisions Of This Court, On The Issue Of Whether Carlines Are Entitled To The Protections Of Section 306.

The Director relies upon *Trailer Train Co. v. State Board of Equalization of the State of California*, 538 F. Supp. 509 (N.D. Cal. 1982) ("*Trailer Train California*"), for the proposition that "the lower federal courts are split" on the issue of whether private rail car companies are entitled to the protections of Section 306(1)(d). Petition, p. 8. The Director's reliance on *Trailer Train California* is misplaced for two reasons.

First, Rule 17 of the Rules of this Court expressly requires a conflict among the *circuit* courts of the United States, not among the federal district courts. Every *circuit* court that has considered the issue has held correctly that private rail car companies are entitled to the full protections of Section 306. *Trailer Train v. State Board of Equalization of the State of North Dakota*, 710 F.2d 468 (8th Cir. 1983); *General American Transportation Corp. v. Louisiana Tax Commission*, 680 F.2d 400 (5th Cir. 1982).

Second, *Trailer Train California* is not a final decision. *Trailer Train California* was decided upon application for preliminary injunction; the case is still pending before the trial court and no interlocutory appeal has been taken. Therefore, the district court's conclusions in *Trailer Train California* are preliminary, subject to change by the district court at any time prior to the issuance of its final decision, and should not be relied upon as indicative of a "split" among the lower federal courts.[3] *See, e.g., Rittmiller v. Blex Oil,*

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[3]*Trailer Train California* was fully considered and rejected by the Eighth Circuit in *Trailer Train Company v. State Board of Equalizaion of the State of North Dakota*, 710 F.2d 468, 471 (8th Cir. 1983), notwithstanding the submission of an amicus brief by the State of California supporting the California court's interpretation.

Inc., 624 F.2d 857, 863 n. 6 (8th Cir. 1980); *Berrigan v. Sigler*, 499 F.2d 514 (D.C. Cir. 1974).

In short, the putative "conflict" discussed in part C of the Director's petition simply does not exist.

3. No Special Or Important Reasons Exist For Granting The Writ.

The Director contends that this case is important because the decision below interferes with the states' ability to administer their tax systems. The Director complains that "an expansive reading of [Section 306] threatens the revenue systems of many states," and that if Section 306 "is held to authorize federal injunctive relief in cases of nonproperty taxes, the tax structure of many states will be impaired." The Director warns that "state excise taxes imposed on rail carriers are potentially endangered." Petition, p. 8. These contentions are illogical, overstated and irrelevant.

Although the Director admits that the Iowa Railway Mileage Tax is discriminatory and illegal, his principal argument before this Court is that federal courts should not be permitted to enjoin collection of the tax and that the Carlines should be relegated to state court. According to the Director, it is the exercise of federal jurisdiction which "impairs" and "threatens" the states. Petition, p. 7. If, however, state courts can be relied upon to "fully [protect] whatever rights taxpayers may have under § 306" (as the Director asserts, Petition, p. 7), then the consequences that will flow from such state court action (i.e., "impairment" of tax structures and "endangerment" of excise taxes) will be no different from the consequences that will flow from the exercise of federal jurisdiction. The dire consequences that the Director hypothesizes are, therefore, no reason for declining or restricting federal jurisdiction.

The Director's predictions of "impairment" and "endangerment" are also grossly exaggerated. Nothing in the

record of this case even remotely suggests that the elimination of the Iowa Railway Mileage Tax "threatens" Iowa's revenue system. The State of Iowa remains free to structure its tax system in any form it chooses, so long as the taxes that it imposes on the railroad industry are not discriminatory within the meaning of Section 306.

Finally, "impairment" of state tax systems is an irrelevant consideration in Section 306 cases. During the course of congressional deliberations leading to the passage of Section 306, Congress fully considered the effects that anti-discrimination legislation would have upon state finances. *See, e.g.*, S. Rep. No. 91-630, 91st Cong., 1st Sess. (1969). Congress concluded that national interests, e.g., revitalization of the nation's railroad system and elimination of economic burdens resulting from discriminatory state taxation, must prevail over the parochial interests of the states in maintaining discriminatory tax systems. In enacting Section 306, Congress intended to eliminate state taxing schemes and practices that discriminate against the railroad industry; Congress gave the states three years within which to bring their statutes and practices into conformity with the Act. *See Southern Railway Co. v. State Board of Equalization*, 715 F.2d 522, 523 n. 1 (11th Cir. 1983).

As recognized by this Court in *Aloha Airlines v. Director of Taxation of Hawaii*, ____ U.S. ____, 104 S. Ct. 291, 295. n. 10 (1983), "impairment" and "disruption" of state finances are inevitable consequences of congressional regulation of state taxation. Since disruption of state finances was plainly anticipated and intended by Congress, such disruption cannot be used as a reason for narrowly construing the Court's jurisdiction under Section 306 and restricting federal injunctive powers under the Act.

CONCLUSION

Although Section 306 is important legislation, the issues raised in this case do not warrant review by this Court. The courts below applied this statute precisely as it is written and with the results intended by Congress. The petition does not present any ground for granting certiorari within the meaning of Rule 17 of the Rules of this Court and should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

SHAREHOLDERS IN TRAILER TRAIN COMPANY

ATCHISON, TOPEKA & SANTA FE RY CO
BOSTON & MAINE CORPORATION
CENTRAL OF GEORGIA RR CO
CHICAGO & NORTH WESTERN TRANS CO
CONSOLIDATED RAIL CORPORATION
DENVER & RIO GRANDE WESTERN RR CO
GRAND TRUNK WESTERN RR CO
KANSAS CITY SOUTHERN RY CO
MISSOURI-KANSAS-TEXAS RR CO
NORFOLK & WESTERN RY CO
READING CO
RICHMOND, FREDERICKSBURG & POTOMAC RR CO
SOUTHERN PACIFIC TRANS CO
UNION PACIFIC RR CO
BALTIMORE & OHIO RR CO
BURLINGTON NORTHERN RR CO
CHESAPEAKE & OHIO RY CO
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
(RICHARD B. OGILIVIE, TRUSTEE)
FLORIDA EAST COAST RY CO
ILLINOIS CENTRAL GULF RR CO
LOUISVILLE & NASHVILLE RR CO
MISSOURI PACIFIC RR CO
NORFOLK & WESTERN RY CO, LESSEE OF
WABASH RR CO
ST. LOUIS SOUTHWESTERN RY CO
SOUTHERN RAILWAY CO
WESTERN MARYLAND RY CO

APPENDIX B

Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976)

(1) Notwithstanding the provisions of section 202(b), any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:

(a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described), for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.

(b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).

(c) The levy or collection of any ad valorem property tax on transportation property at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.

(d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(2) Notwithstanding any provision of section 1341 of title 28, United States Code, or of the constitution or laws of any State, the district courts of the United States shall have jurisdiction, without regard to amount in controversy or citizenship of the parties, to grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as

may be necessary to prevent, restrain, or terminate any acts in violation of this section, except that—

(a) such jurisdiction shall not be exclusive of the jurisdiction which any Federal or State court may have in the absence of this subsection;

(b) the provisions of this section shall not become effective until 3 years after the date of enactment of this section;

(c) no relief may be granted under this section unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 per centum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction;

(d) the burden of proof with respect to the determination of assessed value and true market value shall be that declared by the applicable State law; and

(e) in the event that the ratio of the assessed value of all other commercial and industrial property in the assessment jurisdiction to the true market value of all such other commercial and industrial property cannot be established through the random-sampling method known as a sales assessment ratio study (conducted in accordance with statistical principles applicable to such studies) to the satisfaction of the court hearing the complaint that transportation property has been or is being assessed or taxed in contravention of the provisions of this section, then the court shall hold unlawful an assessment of such transportation property at a value which bears a higher ratio to the true market value of such transportation property than the assessed value of all other property in the assessment jurisdiction in which is included such taxing district and subject to a property tax levy bears to the true market value of all such other property, and the collection of any ad valorem property tax on such transportation property

at a tax rate higher than the tax rate generally applicable to taxable property in the taxing district.

(3) As used in this section, the term-

(a) "assessment" means valuation for purposes of a property tax levied by any taxing district;

(b) "assessment jurisdiction" means a geographical area, such as a State or a county, city, township, or special purpose district within such State which is a unit for purposes of determining the assessed value of property for ad valorem taxation;

(c)"commercial and industrial property" or "all other commercial and industrial property" means all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy; and

(d) "transportation property" means transportation property, as defined in regulations of the Commission, which is owned or used by a common carrier by railroad subject to this part or which is owned by the National Railroad Passenger Corporation.

APPENDIX C

§ 11503. Tax discrimination against rail transportation property

(a) In this section—

(1) "assessment" means valuation for a property tax levied by a taxing district.

(2) "assessment jurisdiction" means a geographical area in a State used in determining the assessed value of property for ad valorem taxation.

(3) "rail transportation property" means property, as defined by the Interstate Commerce Commission, owned or used by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(4) "commercial and industrial property" means property, other than transportation property and land used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy.

(b) The following acts unreasonably burden and discriminate against interstate commerce, and a State, subdivision of a State, or authority acting for a State or subdivision of a State may not do any of them:

(1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

(2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.

(3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax

rate applicable to commercial and industrial property in the same assessment jurisdiction.

(4) impose another tax that discriminates against a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.].

(c) Notwithstanding section 1341 of title 28 [28 USCS § 1341] and without regard to the amount in controversy or citizenship of the parties, a district court of the United States has jurisdiction, concurrent with other jurisdiction of courts of the United States and the States, to prevent a violation of subsection (b) of this section. Relief may be granted under this subsection only if the ratio of assessed value to true market value of rail transportation property exceeds by at least 5 percent, the ratio of assessed value to true market value of other commercial and industrial property in the same assessment jurisdiction. The burden of proof in determining assessed value and true market value is governed by State law. If the ratio of the assessed value of other commercial and industrial property in the assessment jurisdiction to the true market value of all other commercial and industrial property cannot be determined to the satisfaction of the district court through the random-sampling method known as a sales assessment ratio study (to be carried out under statistical principles applicable to such a study), the court shall find, as a violation of this section—

(1) an assessment of the rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the assessed value of all other property subject to the property tax levy in the assessment jurisdiction has to the true market value of all other commercial and industrial property; and

(2) the collection of an ad valorem property tax on the rail transportation property at a tax rate that exceeds the tax ratio rate applicable to taxable property in the taxing district.

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, CLERK

No. 85-682

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United States

OCTOBER TERM, 1985

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Petitioner,

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

AMICUS BRIEF OF THE STATE OF CALIFORNIA, STATE BOARD OF EQUALIZATION IN SUPPORT OF PETITIONER GERALD D. BAIR, DIRECTOR OF THE DEPARTMENT OF REVENUE OF IOWA

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INTEREST OF AMICUS CURIAE

The State of California on behalf of the California State Board of Equalization submits this brief pursuant to Rule 36 as amicus curiae on behalf of petitioner the Iowa Department of Revenue. Rule 36.4 provides that California is not required to obtain the consent of the parties to file the brief.

The California State Board of Equalization is a defendant in a number of actions now pending in which plaintiffs—all the major railroads and car companies operating in California, including

respondents Trailer Train Co., et al. in this petition[1]—allege claims for relief under section 306 of the 4-R Act.[2] *Southern Pacific Transportation Co., et al. v. Board of Equalization, et al.* (N.D. Ca. No. C 81 4365 SW). All the plaintiffs have obtained property tax equalization relief under section 306(1)(a), but the District Court has dismissed the claims of the car company plaintiffs for relief under section 306(1)(d) on the ground that car companies are not common carriers within the meaning of the statute. *Trailer Train Co. v. State Board of Equalization* (N.D. Ca. 1982) 538 F.S. 509, 513. This 1982 ruling of the District Court for the Northern District of California is in direct conflict with the ruling of the Eighth Circuit below.

The California State Board also is concerned about the implications of the Eighth Circuit's ruling that section 306(1)(d) applies to state taxes other than the property tax. Although California does not have an excise tax similar to the Iowa excise tax that is the subject of this litigation, the decision below points the way to federal court review over any California tax which has an indirect impact on a railroad, even though California law affords taxpayers a speedy and adequate remedy in the state courts.

SUMMARY OF ARGUMENT

This Court should issue a writ of certiorari to the Eighth Circuit for the following reasons:[3]

---

[1] Respondents and other car companies own railroad cars which typically are leased to railroads.

[2] The Railroad Revitilization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54. Section 306 is codified at 49 U.S.C. § 11503. The language of section 306 as originally enacted governs issues of statutory construction. *Ogilvie v. State Board of Equalization of North Dakota* (8th Cir. 1981) 657 F.2d 204, 206 n. 1, cert. den. (1981) 454 U.S. 1086.

[3] The California State Board also supports the persuasive arguments made by petitoner Gerald D. Bair, Director of the Iowa Department of Revenue and the other amici in their briefs.

1. In holding that section 306(1)(d) applies to a state excise tax, the Eighth Circuit ignored legislative history which shows that Congress intended only to equalize the property tax burden on the railroad industry by prohibiting the assessment or taxation of rail transportation property at discriminatory high percentages of market value. The first three subsections of section 306 clearly were drafted to provide that specific remedy, and subsection (1)(d) should be understood as a catch-all intended to bar other types of property tax discrimination. The Eighth Circuit's overly broad interpretation of subsection (1)(d) as applying to all types of state taxes, both property and non-property, makes the remainder of section 306 superfluous.

While Congress concluded that a federal remedy was necessary because the property tax discrimination was embedded in state law, there was no finding that the railroad industry suffered from non-property tax discrimination. Congress furthermore was aware of the long-standing tradition, manifested in the Anti-Injunction Act (28 U.S.C. § 1341) and the doctrine of such cases as *Moses Lakes Homes v. Grant County* (1961) 365 U.S. 744, against federal intrusion into the internal tax affairs of the states. Unless reversed, the holding below will lead inevitably to the precise breach in federal state-comity which Congress feared, since in the usual case the entire tax structure and tax policies of a state will have to be reviewed to determine whether a given tax is discriminatory.

2. The Eighth Circuit also erred in holding that private car companies are entitled to relief under subsection (1)(d). Given the references to "transportation property" in the remainder of section 306, the reference in subsection (1)(d) to "common carrier[s]" can only be interpreted as an intent to limit relief to a smaller class of plaintiffs. The Eighth Circuit's ruling creates a precedent that the federal courts may enjoin any state tax, even a non-property tax, as to any taxpayer, which has only an indirect burden on the railroad industry, despite the absence of any evidence that Congress intended such a drastic departure from established tradition. This Court should instead approve the contrary reasoning of *Trailer Train Co. v. State Board of Equalization, supra,* holding that, if Congress had intended to give

subsection (1)(d) protection to taxpayers other than common carriers, it could have done so by using the broad language contained elsewhere in section 306.

ARGUMENT

I

SECTION 306 (1)(d) ONLY APPLIES TO PROPERTY TAXES

While at first impression the language of section 306 may seem awkward and cumbersome, once the legislative history [4] has been considered it becomes apparent that the language is instead precisely tailored to deal with the specific problem Congress was asked to redress.

That problem was the so-called classification systems in many states which placed different types of property into different classifications, each classification being assessed or taxed at a different rate, with rail transportation property typically being placed in the highest classification. The Senate Committee on Commerce described the problem as follows:

> "Discrimination can arise in two ways: First, transportation property may be assessed at a higher proportion of its true market value than comparable non-transportation property is assessed, and second, transportation property may be burdened with a higher tax rate than is applied to comparable non-transportation property." (*Discriminatory State Taxation of Interstate Carriers,* S. Report 92-1085, 92d. Cong. 2d. Sess., p. 5.)
>
> . . .
>
> "For example, a state may assess railroad property for tax purposes at 100% of value, and other property at only 40% of such value; and a state may subject railroad property at a rate

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[4] The history of the earlier proposals which evolved into § 306 may be considered in interpreting § 306. *Trailer Train Co. v. State Board of Equalization* (9th Cir. 1983) 697 F.2d 860, cert. den. (1983) 464 U.S. 846.

> of $1 per $1,000 of assessed valuation, and other property subject to the same tax purpose at the rate of $0.50 per $1000 of assessed valuation." (*Discriminatory State Taxation of Interstate Carriers,* S. Report 1483, 90th Cong. 2d Sess., p. 3.) [5]

Since the classification systems were embedded in state law, the state courts were powerless to end the discrimination.

At no time in the fifteen years of deliberations which led the enactment of section 306 did Congress ever conclude, or even consider the possibility, that the railroad industry was burdened by discriminatory non-property taxes. Yet the Eighth Circuit ignored this legislative hisstory and instead reached a result which obviously goes far beyond what Congress had in mind.

Nor did the Eighth Circuit correctly understand the relationship between subsection (1)(d) and the remainder of section 306. It is undisputed that subsections (1)(a), (1)(b) and (1)(c) refer to property tax discrimination. If subsection (1)(d) applies to any and all state taxes, both property and non-property, then the first three subsections are redundant surplusage. As one District Court has cleverly observed, the only way in which the various parts of section 306 may each be given an independent meaning is to recognize that there is less to subsection (1)(d) "than meets the eye." *Richmond, Fredericksburg Pot. R. v. Department of Tax* (E.D. Va. 1984) 591 F.Supp. 209, 223, aff'd on other grounds 762 F.2d 375.

Subsection (1)(d) was added without comment only three weeks before section 306's enactment. The decision below rests on the assumption that Congress intended, without discussion or warning, the few words of the addition to be a complete enlargement of the scope and purpose of the proposed legislation which had been under deliberation for fifteen years. With the utmost respect for the Eighth Circuit, it makes more sense to view subsection (1)(d) as a catch-all for discriminatory property taxes

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[5] See also *National Transportation Policy,* S. Report 445, 87th Cong., 1st Sess., p. 486; *Discriminatory Taxation of Common Carriers, Hearings On S. 927 Before The Subcomm. On Surface Transportation of the Comm. on Commerce,* 90th Cong., 1st Sess., p. 54.)

which escape the net of the first three subsections. Thus understood, subsection (1)(d) will play its part in the remedy Congress intended and no more.

A narrow interpretation of subsection (1)(d) would also pay heed to Congress' concern that the federal courts not unduly intrude into the internal tax affairs of the states.[6] This case is an unusual one in that the courts below did not have to decide whether Iowa's excise tax is discriminatory, Iowa having conceded that issue. In the usual case there will be no such concession, and the federal court therefore will have to decide for itself whether the state tax under attack should be enjoined. For example, the situation is sure to arise in which a railroad complains of a tax which is not imposed on other transportation industries, and the state defends by showing that the other industries are subject to a tax which does not apply to the railroad. A comparison of the relative economic impact of the two taxes will therefore be required, which can only lead the federal court into a thicket of analytical problems without any guidance from Congress on what route to follow.[7]

Moreover, the tax burden which a state imposes on the various industries within its jurisdiction may often reflect, and legitimately so, the state's perception of the different economic circumstances of those industries. While Congress has mandated the equal distribution of the property tax burden among all commercial and industrial taxpayers, nothing suggests that Congress further intended the federal courts to sit in judgment on how a state chooses to obtain revenue from non-property taxes while at the same time promoting the overall economic health of its residents.

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[6] See remarks of Senator Lausche, S. Rep. 1483, *supra,* p. 26. See also the references to *Moses Lake Homes v. Grant County* (1961) 365 744 at S. Rep. 1483, *supra,* 11-12; S. Rep. 91-630, *supra,* p. 12. In *Moses Lakes* this Court held that the federal courts may not assess or levy state taxes.

[7] See *Alabama Great Southern R. Co. v. Eagerton* (11th Cir. 1981) 663 F.2d 1036, 1041, in which the Eleventh Circuit directed the District Court to perform such an analysis.

If this case is not properly brought under section 306, this case would be barred by the Anti-Injunction Act, 28 U.S.C. section 1341, depriving the district courts of jurisdiction to enjoin the collection of "any tax under state law" As this Court has recognized, the Act "has its roots in equity practice, in principles of federalism and in recognition of the operative need of a state to administer its own financial operations." *Tully v. Griffin Inc.* 429 U.S. 68, 73 (1976). The Act "reflect[s] the fundamental principle of comity between federal courts and state governments that is essential to our federalism" *Fair Assessment in Real Estate Association v. McNary* (1981) 454 U.S. 100, 103.

Although section 306 of course contains an exemption from the Act, there is no evidence that Congress intended the exemption to be a broad one. See *United Gas Pipeline Company v. Whitman* (6th Cir. 1979) 595 F.2d 323, 330, holding that exceptions to the Act are not recognized unless clearly expressed by Congress. A recognition of the policies which lie behind the Act therefore provides additional support for a narrow interpretation of subsection (1)(d).

II

RELIEF UNDER SECTION 306(1)(d) IS LIMITED TO COMMON CARRIERS

The Eighth Circuit compounded its error by holding that car companies are entitled to subsection (1)(d) relief even though they admittedly are not "common carrier[s]" within the meaning of the statute. The Eighth Circuit's rationale, which is that subsection (1)(d) prohibits any tax which indirectly "results" in a discriminatory burden on a railroad, would allow a steel mill to come to the federal courts for relief. A more reasonable interpretation is that subsection (1)(d) relief is limited to taxpayers which are common carriers as defined by 49 U.S.C. section 10102(4). The term is obviously one of art and, given the reference to "transportation property", a broader term, in the remainder of section 306, its use must have been intended to narrow the coverage of subsection (1)(d). As the District Court observed in the California 4-R Act litigation:

> "If Congress has intended to protect the entire operating unit of common carriers it could have done so by removing the restrictive language in this subsection. In fact, it is more probable that the limitation was included to prevent the application of such a general, catch-all provision to any situation other than one involving the common carrier directly." *Trailer Train, supra,* at 513.

Nor is the gloss put on subsection (1)(d) supported by policy considerations, since nothing in the legislative history suggests that the suppliers of goods and services to the nation's railroads are being taxed excessively. The discussion above of the strong tradition against federal interference with the internal tax affairs of the states is equally applicable here.

Even if subsection (1)(d) is interpreted as applying to non-property taxes, this Court should still hold that only railroads may obtain relief under subsection (1)(d). Such an interpretation would be supported on the basis that Congress intended to balance the increased scope of the taxes prohibited by subsection (1)(d) (in comparison with the scope of the rest of section 306) by limiting the class of plaintiffs who are entitled to its benefits, and the interpretation would avoid at least some of the untoward consequences of the decision below.

CONCLUSION

For the reasons set forth above, this Court should issue a writ of certiorari to the Eighth Circuit.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 16 1985
JOSEPH F. SPANIOL, JR.
CLERK

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BRIEF OF THE STATES OF NORTH DAKOTA, SOUTH DAKOTA, UTAH AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.1, the signatory states submit this Brief as *Amici Curiae* in support of the Petition for a Writ of Certiorari. Since this Brief is being sponsored and filed by the aforementioned states, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Trailer Train Company, Railbox Company and Railgon Company v. Bair*, 765 F.2d 744 (8th Cir. 1985).

III. INTEREST OF AMICI CURIAE

The interests of the states joined as Amici in this Brief concern what they believe to be the far reaching effects of the opinion of the Court of Appeals as it relates to implication of state excise taxes under 49 U.S.C. § 11503 and to state excise taxation of nonrail carriers. In addition, the states believe that the Court of Appeals misapplied § 11503 which creates a narrow federal court jurisdictional exception to the Tax Injunction Act, 28 U.S.C. § 1341. Such jurisdictional exception can only apply to state property taxes in a limited context, and not to state excise taxes.

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IV. ARGUMENT

The question of whether § 306(1) (d) of the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), codified as 49 U.S.C. § 11503(b) (4), implicates state excise taxes, is of great import to the states. If such implication exists, states must re-examine their excise tax laws to ascertain whether those taxes need restructuring to remove perceived differential tax treatment. Such state excise taxes would include those reasonable forms of taxation, historically and commonly in effect, such as income taxes, sales and use taxes, business license taxes, and gross receipts taxes.

It is unclear from the provisions of § 306 of the 4-R Act whether state excise taxes are implicated. With the exception of the "any other tax" language, § 306 only expressly addresses property taxes. The § 306(3) definitions

concern only property taxes. Prohibited tax schemes in § 306(1) (a) - (c) only implicate property taxes. Express Federal District Court jurisdiction is conferred in § 306(2) for discretionary property taxes. Section 306(2) (c) authorizes use of sales assessment ratio studies, a technique only applicable to and relevant for property taxes. The class to be used for discriminatory tax comparison purposes is commercial and industrial property. No express class is set forth in § 306 to make a comparison for discriminatory excise tax purposes. Within the property tax context of § 306, the use of three words "any other tax" in § 306(1) (d) does not indicate a congressional intent to include state excise taxes within the scope of the statute.

The 4-R Act's legislative history indicates that Congress was addressing discriminatory property taxes only. The Senate Conference Report, in commenting upon the scope of § 306, stated the Congressional intent was to limit "the provision to taxation of railroad property." 2 U.S. *Code Cong. & Ad. News,* 148, 181. Such a statement would include property taxation of property used in the operation of a railroad, whether owned by a rail carrier or, as in Respondents' situation, owned by nonrail carriers. Such a statement would not, however, show an intent to implicate excise taxes, whether imposed on rail carriers or nonrail carriers.

This Court has not addressed the question of whether the 4-R Act implicates state excise taxes. This Court can now address this issue and provide guidance to the states in structuring their excise taxes.

Even if state excise taxes are implicated in § 306(1) (d), the Court of Appeals disregarded the clear language

of that subsection which only proscribes discriminatory state taxation against rail carriers. Respondents are not rail carriers. If the "any other tax" language in the statute is clear and unambiguous as the Court of Appeals suggests, then surely it is equally clear that the language "results in discriminatory treatment of a common carrier by railroad" is unambiguous and proscribes only differential taxation imposed on rail carriers, and not on those who have a business relationship, as do Respondents, with rail carriers. The Court of Appeals, thus, erred in extending the scope of § 306(1) (d) to include nonrail carriers.

Whether nonrail carriers are included within the ambit of § 306(1) (d) is the subject of conflict in the lower courts. In *Trailer Train Co. v. State Board of Equalization*, 538 F. Supp. 509 (N.D. Cal. 1982), the Court held that a nonrail carrier could not invoke the provisions of § 306(1) (d). In *Trailer Train Co. v. State Board of Equalization*, 710 F.2d 468 (8th Cir. 1983) and in the instant case, the Eighth Circuit Court of Appeals held that § 306(1) (d) could be invoked by nonrail carriers. This Court should resolve this conflict in the lower courts.

Finally, the Eighth Circuit Court of Appeals' expansive interpretation of § 306(2) simply disregards the unambiguous language in that provision that a federal district court cannot grant any relief whatsoever "unless the ratio of assessed value to true market value, with respect to transportation property, exceeds by at least 5 percentum the ratio of assessed value to true market value, with respect to all other commercial and industrial property in the same assessment jurisdiction." This clear language precludes federal district court jurisdiction over state excise

taxes under a 4-R Act discrimination claim and such claims should be heard in a state court. The states have a vital interest in the scope of their court jurisdiction or whether that jurisdiction has been eroded by the 4-R Act and, if so, the extent of such erosion.

V. CONCLUSION

The Petition raises questions of great concern to the Amici states and presents important questions which this Court should address. Therefore, we urge this Court to grant the Petition for a Writ of Certiorari in the present case and give plenary consideration to the matter.

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